A

ISMAIL MUDA

v.

DANAHARTA URUS SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
JAMES FOONG JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: T-02-557-2004]

C

6 DECEMBER 2006

LAND LAW: *Charge - Possession of charged land - Rights of chargee - Application to take possession of charged land by subsidiary of Pengurusan Danaharta Nasional Berhad - Whether to proceed under the National*

D

Land Code - Whether requiring prior approval or order of court - Pengurusan Danaharta Nasional Berhad Act 1998, s. 57(1) - National Land Code, Fifteenth Schedule

CIVIL PROCEDURE: *Injunction - Charge - Default by chargor - Application by chargee to injunct chargor from occupying charged land -*

E

Chargee a subsidiary of Pengurusan Danaharta Nasional Berhad - Triable issues - Pengurusan Danaharta Nasional Berhad Act 1998, s. 57(1) - National Land Code, Fifteenth Schedule

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The appellant had charged his immovable property ('the charged land') to a bank ('the bank') as security for a loan granted by the bank to one Gabungan Ismail Penarek Sdn Bhd ('Gabungan'). Gabungan defaulted in the repayment and the loan became a non-performing loan under the applicable banking rules. Subsequently, the respondent, a subsidiary of Pengurusan Danaharta Nasional

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Berhad ('Danaharta'), acquired from the Bank by way of statutory vesting under s. 14 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('Danaharta Act') the rights, title and interest relating to the loan to Gabungan. Having registered its interest as chargee thereof, the respondent then sought to sell the charged land by

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way of private treaty. However, no such sale could be effected as the appellant continued to occupy the charged land, and had carried out excavation and quarrying activities thereon. In the circumstances, pending their action against the appellant for breach of the loan agreement, the respondent applied for an order

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of possession of the charged land and for an injunction to bar the appellant from carrying on the activities aforesaid. It was the respondent's stand that, upon the words of s. 57 of the

Danaharta Act, they were empowered to recover possession of the charged land, and further, such recovery could be effected without the need to institute proceedings under the National Land Code ('the Code'). The appellant disputed Gabungan's indebtedness to the respondent, and in any case argued that, to recover possession, the respondent ought to proceed under the provisions of the Code, and not the Danaharta Act. The High Court allowed the respondent's application, whereof the appellant appealed.

Held (dismissing the appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) The issue at this stage is a simple one, namely, whether the respondent has discharged the initial burden that lies on them of showing that there are issues to be tried.

(2) It is not necessary for this court at this stage to give its findings as to the meaning to be ascribed to all of the statutory provisions referred to by the parties. That must necessarily be determined at trial.

(3) The appellant has disputed Gabungan's indebtedness in this suit. The appellant has also instituted separate proceedings challenging the validity of the charges which are also the basis upon which this suit is grounded. It is also to be noted that the appellant's attempt to strike out this case based on the same arguments was unsuccessful. The appellant has further filed an appeal against the decision dismissing the striking out application, but has since withdrawn the same. By his conduct in withdrawing the appeal, it could be inferred that the appellant has accepted that there are issues to be tried in this case.

(4) Giving the words in s. 57(1) of the Danaharta Act their plain and ordinary meaning, *prima facie* it would appear that the respondent is entitled under s. 57(1) to take steps to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land so as to inspect, protect, secure, maintain or repair the land. Further, the amendment to the Code by the inclusion of a new Fifteenth Schedule under the heading "Modifications to facilitate the implementation of the Danaharta Act" has reinforced the rights and powers of Danaharta and its

A subsidiaries. Likewise, the special provisions in para 4A of the Fifteenth Schedule has conferred upon Danaharta, in addition to the rights of a chargee under the Code, the right to employ guards to protect and secure the land. It is also clear that, pursuant to para 10, the rights under the
B Fifteenth Schedule are exercisable without the need for any approval, confirmation or order of court.

(4a) We would agree with the respondent that for Danaharta to have the power to secure and protect the charged land, they
C must, by necessary implication, have the power to take possession of it. Thus, based on the appellant's own action, and applying the law to the circumstances of this case, *prima facie*, the respondent has satisfied the first test. There clearly are issues to be tried in this case.

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(5) It cannot be denied that carrying out quarrying and excavation activities on the charged land would result in the depletion of the natural resources and diminution in value and quality of the charged land. Hence, in the circumstances of this case, in the event that the respondent were to
E succeed at the trial, damages would not be an adequate remedy. Consequently, the learned judge was right in holding that the balance of convenience lies in favour of the respondent, and in allowing the respondent's application and issuing the interim order herein.
F

Bahasa Malaysia *translation of headnotes*

Perayu telah menggadaikan harta tak alihnya ('tanah digadai') kepada sebuah bank ('bank') sebagai jaminan kepada satu
G pinjaman yang diberikan oleh bank syarikat yang dipanggil Gabungan Ismail Penarek Sdn Bhd ('Gabungan'). Gabungan mungkir membayar balik dan pinjaman menjadi satu pinjaman lapuk di bawah kaedah-kaedah semasa bank. Berikutnya, responden, anak syarikat Pengurusan Danaharta Nasional Berhad ('Danaharta'),
H telah mengambilalih dari Bank melalui satu perintah letakhak di bawah s. 14 Akta Pengurusan Danaharta Nasional Berhad ('Akta Danaharta') hak-hak, milikan dan kepentingan berhubung pinjaman kepada Gabungan. Responden mendaftarkan dirinya sebagai pemegang gadaian, dan selepas itu mengambil langkah untuk
I menjual tanah digadai melalui private treaty. Penjualan bagaimanapun tidak dapat dibuat oleh kerana perayu masih menduduki tanah

digadai, dan menjalankan aktiviti-aktiviti pengorekan tanah dan kuari di situ. Dengan yang demikian, sementara menunggu guaman terhadap perayu kerana melanggari perjanjian pinjaman, responden memohon mendapatkan perintah milikan terhadap tanah digadai dan injunksi bagi melarang perayu dari meneruskan aktiviti-aktivitinya seperti di atas. Adalah menjadi pendirian responden bahawa, dengan memberikan kandungan s. 57 Akta Danaharta maksudnya yang semulajadi dan biasa, mereka berhak untuk mendapat milikan tanah digadai, dan bahawa, perolehan milikan tersebut boleh dilaksana tanpa perlu memulakan prosiding di bawah Kanun Tanah Negara ('Kanun'). Perayu menyangkal bahawa Gabungan telah berhutang kepada responden, dan walau apapun berhujah bahawa, untuk mendapatkan milikan, responden seharusnya bertindak di bawah peruntukan-peruntukan Kanun, dan bukannya Akta Danaharta. Mahkamah Tinggi membenarkan permohonan responden dan perayu merayu.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Isu yang berbangkit di peringkat ini hanyalah satu isu mudah, iaitu, sama ada responden telah memenuhi tanggungjawab awalnya untuk membuktikan bahawa terdapat isu-isu yang boleh dibicarakan.

(2) Di peringkat ini, tidaklah perlu untuk mahkamah ini membuat keputusan terhadap apakah maksud yang harus diberi kepada peruntukan-peruntukan statut yang dirujuk oleh pihak-pihak. Keputusan mengenainya harus diputuskan di perbicaraan nanti.

(3) Perayu telah menyangkal keberhutangan Gabungan dalam guaman ini. Perayu juga telah memulakan guaman dalam prosiding berasingan mencabar kesahan gadaian yang turut menjadi asas guaman di sini. Harus juga diperhatikan bahawa percubaan perayu untuk membatalkan kes ini atas alasan yang sama telah menemui kegagalan. Seterusnya, perayu telah memfail rayuan terhadap keputusan menolak permohonan pembatalan, tetapi telah menarik balik rayuan itu. Melalui tindakannya menarik balik rayuan, andaian boleh dibuat bahawa perayu mengakui bahawa wujud isu-isu yang boleh dibicarakan dalam kes ini.

(4) Memberi perkataan-perkataan di s. 57(1) Akta Danaharta maksudnya yang biasa, responden, secara *prima facie*, nampaknya berhak di bawah s. 57(1) untuk mengambil langkah-langkah untuk melindungi nilai tanah atau mencari jalan untuk menjual tanah melalui private treaty, termasuk dengan memasuki tanah bagi tujuan memeriksa, melindungi, menjaga, mengekal atau membaikpulih tanah. Selain itu, pindaan kepada Kanun dengan memasukkan ke dalamnya Jadual ke Limabelas yang baru di bawah tajuk "Modifications to facilitate the implementation of the Danaharta Act" telah memperkukuhkan hak-hak dan kuasa Danaharta dan anak-anak syarikatnya. Begitu juga, peruntukan khas di perenggan 4A Jadual ke Limabelas memberikan Danaharta, selain dari hak-hak seorang pemegang gadaian di bawah Kanun, hak untuk mengupah jaga untuk menjaga dan melindungi tanah. Juga jelas bahawa, di bawah perenggan 10, hak-hak di bawah Jadual ke Limabelas boleh dilaksanakan tanpa perlu mendapat kebenaran, pengesahan atau perintah mahkamah.

(4a) Kami bersetuju dengan responden bahawa, untuk Danaharta mempunyai kuasa untuk menjaga dan melindungi tanah digadai, mereka hendaklah, secara implikasinya, mempunyai kuasa untuk mengambil milikan tanah tersebut. Oleh itu, berdasarkan tindak tanduk perayu sendiri, dan dengan melaksanakan undang-undang kepada keadaan kes, ujian pertama telah secara *prima facie* dipenuhi oleh responden. Jelas bahawa terdapat isu-isu yang boleh dibicarakan dalam kes ini.

(5) Tidak dinafikan bahawa kerja-kerja kuari dan pengorekan tanah yang dijalankan di atas tanah digadai akan menjejaskan bahan semulajadinya serta akan mengurangkan nilai dan kualiti tanah digadai. Oleh itu, dalam keadaan kes di sini, sekiranya responden berjaya pada perbicaraan kelak, gantirugi bukan merupakan remedi yang mencukupi. Ianya mengikut bahawa yang arif hakim betul dalam memutuskan bahawa imbangan keselesaan berpihak kepada responden, dan dalam membenarkan permohonan dan mengeluarkan perintah interim di sini.

Case(s) referred to:
American Cynamid Co v. Ethicon [1975] 1 All ER 504 510 ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 17A
Pengurusan Danaharta Nasional Berhad Act 1998, ss. 14, 57(1), (6) 60(1), (2)
Rules of the High Court 1980, O. 29

For the appellant - Mahinder Singh Dulku (Mohd Hussain Ibrahim with him); M/s Mohd Hussain Ibrahim & Co
For the respondent - S Nantha Balan (Vijay Ray with him); M/s Zul Rafizue & Partners

[Appeal from High Court, Kuala Terengganu; Civil Suit No: 22-55-2003]

Reported by WA Sharif

JUDGMENT

Zaleha Zahari JCA:

[1] It was the unanimous decision of this court on 18 April 2006 that this appeal be dismissed with costs. The High Court Judge's decision dated 7 June 2004 allowing the respondent's application in encl. (3) was affirmed. We now state our reasons for doing so.

[2] The principles guiding courts whether to allow an interlocutory relief before trial are clear. A plaintiff seeking interlocutory relief must establish a *prima facie* case of a breach of its rights. Courts must however be mindful of the words of Lord Diplock in *American Cynamid Co. v. Ethicon* [1975] 1 All ER 504 510 that it is no part of the court's function at this stage of litigation to resolve conflicts of evidence as to the facts on which the claim of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. A decision at this stage must necessarily be based on facts which are not disputed or deemed admitted.

[3] The issues for determination in this appeal revolve around whether there are issues to be tried, whether damages would be an adequate remedy and where the balance of convenience lies.

[4] Before dealing with the background facts and rival contentions leading to this application I propose to set out the statutory provisions raised in arguments in this application. They are as follows:

(a) PENGURUSAN DANAHARTA NASIONAL BERHAD ACT 1998

PART VII

ADDITIONAL RIGHTS

57. (1) Notwithstanding any other law and in addition to any other power the Corporation may have under... any other law, the Corporation ... as holder of any security, whether as chargee ... assignee ... or otherwise, over any property shall be entitled –

(a) to dispose of such property .... by way of private treaty; and

(b) where such property consists of land, to take all steps as it deems fit to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land ... to inspect, protect, secure, maintain or repair the land.

...

...

(6) The Corporation's rights under subsection (1) –

(a) may be exercised notwithstanding any order for sale made pursuant to any rules of the court, the National Land Code ... or any other law ...;

(b) may be exercised without the need for any approval, confirmation or order of court;

...

...

PART IX

APPLICATION OF THE ACT

60. (1) Subject to subsections (2), (3) and (4), the provisions of Parts ... VII ... of this Act shall apply to every subsidiary of the Corporation prescribed under subsection (2) as if the subsidiary is the Corporation itself.

...

...

(b) THE NATIONAL LAND CODE

5C. (1) Upon the coming into force of the Pengurusan Danaharta Nasional Berhad Act 1998, the Fifteenth Schedule which provides for the modifications to the National Land Code to facilitate the implementation of the Pengurusan Danaharta Nasional Berhad Act 1998 shall apply and the Act shall be read subject to the provisions of the Schedule.

FIFTEENTH SCHEDULE

(Section 5C)

MODIFICATIONS TO FACILITATE THE IMPLEMENTATION OF THE PENGURUSAN DANAHARTA NASIONAL BERHAD ACT 1998

4A. (1)Danaharta shall, in addition to the rights of a chargee under the Code, have at all times the right –

(a) to employ guards to protect and secure the land and all buildings on the land;

...

...

10. Danaharta's rights under this Schedule –

(a) may be exercised notwithstanding any order for sale made whether pursuant to any rules of court, the Code or any other law ...;

(b) may be exercised without the need for any approval, confirmation or order of court;

...

...

Background

[5] The background facts upon which the abovementioned legal provisions have to be considered are these: Danaharta Urus Sdn. Bhd (the plaintiff in the court below and respondent in this appeal), a company incorporated under the Companies Act 1965,

A is a wholly-owned subsidiary of Pengurusan Danaharta Nasional Berhad ("Danaharta") and has been prescribed as a subsidiary of Danaharta pursuant to s. 60(1) and (2) of the Pengurusan Danaharta Nasional Berhad Act 1998 ("the Danaharta Act").

B **[6]** Pursuant to agreements *via* letters dated 5 October 1981 and 20 August 1983 (exhs. "KA1" and "KA2", "the loan agreements") Bank Bumiputra Malaysia Berhad (now known as Bumiputra Commerce Bank Berhad ("the bank")) had agreed to extend credit facilities totaling RM3,402,365.85 ("the loan") to C Gabungan Ismail Penarek Sdn Bhd ("Gabungan") upon the request of Gabungan. The loan was secured, *inter alia*, by third party charges over immovable property known as HS(D) 310, Lot No. PTG 2094, Mukim of Penghulu Diman, District of Ulu Terengganu, State of Terengganu ("the charged land") belonging D to the appellant in favour of the bank. The respondent's case was that pursuant to the loan agreements, the bank had disbursed the loan amounts to Gabungan.

[7] The respondent contended that Gabungan was in breach E of the loan agreements in that it failed to settle any of its indebtedness to the bank. Gabungan's loan was thus a non-performing loan under the applicable banking rules. On 7 May 1999, the respondent acquired from the bank by way of Statutory Vesting under s. 14 of the Danaharta Act the rights, title and F interest relating to the loan to Gabungan. Notice of the Statutory Vesting was given to Gabungan by the bank and the respondent *via* letters dated 7 May 1999 and 10 May 1999 respectively. By a letter dated 14 May 1999, the bank gave further notice of the vesting to the appellant. The respondent's interest as chargee of the charged land has been registered at the Kuala Terengganu G Land Registry. According to the respondent, at all material times, Gabungan was and still is in breach of the loan agreements in that it failed to settle any of its indebtedness after the statutory vesting.

[8] It was the respondent's case that s. 57 of the Danaharta H Act and para. 5 of the Fifteenth Schedule to the National Land Code ("the Code") conferred upon them the right to sell the Charged Land by way of private treaty. In exercise of this right they had entered into a sale and purchase agreement dated 1 July 2002 as vendor, with Foy Construction Sdn. Bhd. as purchaser. I By reason of the respondent's inability to fulfil its obligations under

the said sale and purchase agreement to deliver vacant possession of the charged land as a result of the appellant's failure to vacate the charged land, the purchaser had terminated the sale and purchase agreement effective from 1 April 2003.

[9] The respondent's complaint was that its employees, servants and agents had been prevented from entry and access onto the charged land contrary to their entitlement in law to possession and control of the charged land. Access to the charged land could only be made *via* an adjacent land owned by the appellant held under Lot No. PTG 3222 ("the appellant's adjacent land"). The respondent's servants or agents had, on 15 July 2002 and 24 September 2002, attempted to make site visits to the charged land *via* the appellant's adjacent land but were denied entry by the appellant, his servants and/or agents.

[10] The respondent then caused a writ of summons to issue on 13 September 2003 against the appellant seeking:

(a) a declaratory order that they were entitled to possession of the charged land;

(b) a permanent injunction restraining the appellant from carrying out any form of excavation or mining activities on the charged land; and

(c) other consequential reliefs.

[11] On the same day, 13 September 2003, the respondent also filed a summons-in-chambers (encl. (3) under O. 29 of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court for, *inter alia*, interim orders pending trial:

(a) An order that upon the plaintiff's undertaking to abide by any order the court may make as to damages, the defendant be restrained from carrying out/on any form of excavation and/or quarrying and/or mining activity/operations whatsoever or from carrying out/on any other form of development whatsoever on the said land, until further order of the court;

(b) An order that the plaintiff, its servants and/or agents be permitted to enter upon and to take possession of the said land including fixtures and fittings on the said land and other things attached thereto, pending further order by the court.

[12] The application for interim relief was grounded on the following facts. The appellant by himself, his agents, servants or otherwise, was carrying out quarrying and excavation activities on the charged land. These activities of the appellant had resulted in the depletion of the natural resources, an irreversible alteration and/or destruction of the physical state, nature and condition of the charged land. It had also resulted in the diminution in value and quality of the charged land thereby causing irreparable loss and damage to the respondent.

[13] The respondent's contention was that an order of possession of the charged land should be granted to them in order to, *inter alia*, preserve the value of the charged security and/or facilitate any future sale of the said land by private treaty. On the restraining order sought by the respondent, it was contended that they would suffer irreparable loss and damage in the value of the charged land if the excavation and quarrying activities of the appellant on the charged land was not restrained pending the adjudication and determination of their action against the appellant.

[14] The appellant took issue. He disputed that Gabungan was indebted to the respondent as alleged. According to the statement of defence filed, the contention of the appellant was that the bank had granted two separate credit facilities to Gabungan (RM3,002,365.85 and RM400,000) and one to Jerlan Kuari Sdn. Bhd. (RM300,000) and that there were three charges of the charged land. The appellant alleged that the 1st charge covered only RM1,602,365.85 of the loan of RM3,002,365.85 to Gabungan and the 3rd charge covered the loan of RM400,000 to Gabungan, making a total of RM2,002,365.85 only, while the 2nd charge covered the loan to the other company. The appellant therefore denied that the charges covered the entire loan of RM3,402,365.85 to Gabungan. It was further alleged that although the loan secured by the 1st charge was for RM1,602,365.85, only RM1,000,000 was released by the bank to Gabungan and that this amount had been fully settled by Gabungan.

[15] The validity of the said 1st, 2nd and 3rd charges are the subject matter of separate proceedings (ie, Kuala Terengganu High Court Civil Suit No. 22-81-2003) between the appellant as plaintiff, the bank as 1st defendant, the respondent as 2nd defendant, and the Registrar of Titles as the 3rd defendant.

[16] In opposing the respondent's application for an interim order pending trial, the appellant's case was that, as the registered proprietor of the charged land, he was entitled to peaceful possession and enjoyment thereof. The appellant then contended that the respondent had to proceed under ss. 270-277 of the Code concerning "Remedies of Chargees: Possession" in order to recover possession of the charged land; that a chargee is only entitled to possession of the charged land in the limited circumstances set out in Chapter 4 of Part Sixteen of the Code and that the respondent's application was contrary to s. 44 of the Code.

[17] The appellant further contended that the application for an interlocutory injunction pending trial should also be dismissed as the charged land was subject to a restriction of interest (ie, that it cannot be transferred, charged, or leased out without the consent of the state authority). The appellant was of the view that the respondent would not be prejudiced by the appellant's continued possession of the charged land and that damages would be an adequate remedy.

Are There Issues To Be Tried?

[18] The respondent's counsel in his submission argued that giving the words contained in s. 57 of the Danaharta Act and the Fifteenth Schedule to the Code (ie, paras 4A(1)(a) and 10) their plain and ordinary meaning, the respondent is clearly conferred with the power to recover possession of the charged land without the need to institute proceedings under the Code. Counsel further argued that the existence of a chargee's right of possession under the Code does not preclude the respondent's recourse to the right of possession under the Danaharta Act which is a special Act enacted to enable the respondent to discharge their functions quickly and with minimal delay for the purposes of promoting the revitalization of the nation's economy by injecting liquidity into the financial system.

[19] Reliance was also placed on s. 17A of the Interpretation Acts 1948 and 1967 which states that a construction "that would promote the purpose and object underlying the Act shall be preferred".

[20] The respondent's counsel further submitted that the intention of the legislature is amplified by the amendment of the Code by the inclusion of the new Fifteenth Schedule under the heading "Modifications to facilitate the implementation of the Pengurusan Danaharta Nasional Berhad Act 1998". The inclusion of this new Fifteenth Schedule in the Code reinforces and confirms the rights and powers of Danaharta and its subsidiaries conferred by the Danaharta Act.

[21] Before stating our views on this issue we would like to place on record that it is not necessary for us at this stage to give our firm findings as to the meaning to be ascribed to all of the statutory provisions referred to us in argument by the respective parties in this appeal. That must necessarily be determined at trial. The issue before us at this stage is a simple one, has the respondent discharged the initial burden that lies on them of showing that there are issues to be tried? Our views on this issue are these.

[22] The appellant has disputed Gabungan's indebtedness in this suit. He has also instituted separate proceedings challenging the validity of the charges which are also the basis upon which this suit is grounded. The court also notes that the appellant's attempt to strike out this case based on the same arguments was unsuccessful. The appellant had filed an appeal against the decision of the High Court dismissing the striking out application *vide* Court of Appeal Civil Appeal No. T-02-564-2004, and in January 2006, that Appeal had, with the consent of the respondent, been withdrawn with no order as to costs. By his conduct in withdrawing that earlier appeal, it could be inferred that the Appellant had accepted that there are issues to be tried in this case.

[23] Giving the words in s. 57(1) of the Danaharta Act their plain and ordinary meaning, *prima facie* it would appear that the respondent is entitled under s. 57(1) to take steps to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land so as to inspect, protect, secure, maintain or repair the land. Under s. 57(6) the rights under s. 57(1) are exercisable without the need for any approval, confirmation or order of court.

[24] The amendment of the Code by the inclusion of a new Fifteenth Schedule under the heading "Modifications to facilitate the implementation of the Danaharta Act" reinforces the rights and powers of Danaharta and its subsidiaries. The special provisions in para. 4A of the Fifteenth Schedule confer upon Danaharta, in addition to the rights of a chargee under the Code, the right to employ guards to protect and secure the land and all buildings on the land; and pursuant to para. 10, the rights under the Fifteenth Schedule are also exercisable without the need for any approval, confirmation or order of court. We therefore agree, as submitted by the respondent's counsel, that for Danaharta to have the power to secure and protect the charged land, they must, by necessary implication, have the power to take possession of it.

[25] Thus, based on the appellant's own action, and applying the law to the circumstances of this case, *prima facie*, the respondent has satisfied the first test. There clearly are issues to be tried in this case.

Whether Damages An Adequate Remedy And Where Does The Balance Of Convenience Lie?

[26] On the application of whether damages would be an adequate remedy and where the balance of convenience lie, it cannot be denied that carrying out quarrying and excavation activities on the charged land would result in the depletion of the natural resources and diminution in value and quality of the land bearing in mind the fact that the charged land has only a leasehold tenure of thirty (30) years expiring on 8 June 2010. We therefore agree that in the circumstances of the present case, in the event of the respondent succeeding at the trial, damages would not be an adequate remedy.

[27] The learned judge was therefore right in holding that the balance of convenience lies in favour of the respondent.

[28] To conclude, the learned judge was right in allowing the respondent's application in terms of encl. (3) and in issuing the interim order which he did.

[29] For the abovementioned reasons the appeal was accordingly dismissed with costs.